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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICK WILLIAM SMITH,

Defendant and Appellant.

F077218

(Super. Ct. No. 2067526)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Dawna Reeves, Judge.

C. Athena Roussos, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and A. Kay Lauterbach, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Poochigian, Acting P.J., Peña, J. and Snauffer, J.

INTRODUCTION

Appellant Patrick William Smith was found guilty by a jury of assault with a firearm, in violation of Penal Code¹ section 245, subdivision (a)(2), and grossly negligent discharge of a firearm, in violation of section 243.6, subdivision (a). The jury also found true that Smith personally used a firearm within the meaning of section 12022.5, subdivision (a).

Smith contends the trial court was required sua sponte to instruct the jury with a unanimity instruction pertaining to the assault with a firearm charge because there were multiple acts that potentially could have constituted the basis of the offense. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

Sergio Lopez had known Smith in high school. After high school, Smith, his wife Diane, and Lopez maintained a casual friendship. In May 2014, Smith and Diane were experiencing marital problems and Diane and Lopez engaged in an affair. Their affair was “short lived” and had ended by July 2014.

In early July 2014, Diane told Smith about the affair she had with Lopez. On July 7, 2014, Smith went to Lopez’s residence to “confront him” and brought a gun. Lopez had just arrived home after doing some shopping; it was dark outside.

When Lopez turned onto his street, his attention was drawn to two individuals wearing hooded sweatshirts; they were zipped up and the hoods were on. He thought it unusual because it “was really hot.” Lopez parked on the street outside his home. Lopez remained seated in his car, trying to “process” what he was seeing. The two individuals were standing directly across from his house on the opposite side of the street.

One of the individuals left and the other walked directly toward Lopez’s car, pointing a gun at him. Lopez could see it was Smith walking toward him with a gun.

¹ References to code sections are to the Penal Code.

Smith was “right outside” Lopez’s vehicle, pointing the gun at Lopez, and Lopez was “pleading” with Smith to lower the gun. Lopez’s window was down and if he reached out, he could have touched the gun.

Lopez could tell Smith “wasn’t processing” his request to put down the gun; Lopez was scared. Lopez closed his eyes for a “split second,” heard a loud bang, and was struck in the mouth by something. Smith walked backwards to the front of Lopez’s car, still pointing the gun at Lopez, and said, “You’re dead mother[*****].”

Lopez’s then 17-year-old son was waiting for his father to return. The son looked out the kitchen window and saw Lopez parked on the street. He went and opened the front door, heard a loud bang, and saw the glass in the back windshield explode. He did not see Smith until Smith was at the front of the car, pointing a gun at his father. The son called 911.

Officer Benjamin Brandvold responded to the scene. He confirmed the back window of Lopez’s car was broken and there was glass on the ground. Brandvold advised Smith of his *Miranda* rights.² Smith was not in need of any medical attention. Smith told Brandvold he fired his gun twice; once when he shot the front left tire of Lopez’s car and once accidentally when he hit Lopez in the mouth.

In Smith’s recorded interview with police, he admitted going to Lopez’s house with a gun; firing the gun twice; and punching Lopez in the face. The recorded interview was played for the jury.

Lopez’s four front teeth were knocked loose with such force that it tore all the ligaments holding the teeth to the jaw. The force of the blow also killed the nerve in two of the front teeth necessitating a root canal and crowns. Lopez’s teeth had to be wired to stop them from moving; he wore the wire for three years. Lopez was on a soft food and liquid diet for the rest of the summer and pain medication for a month.

² *Miranda v. Arizona* (1964) 384 U.S. 436.

On July 18, 2014, Lopez's son saw Smith at the store. Smith told the son, "Your father better not testify or the home boys are going to get him."

Smith was charged in count I with assault with a firearm, in violation of section 245, subdivision (a)(2); in count II with threatening to assault Lopez, in violation of section 422, subdivision (a); in count III with grossly negligent discharge of a firearm, in violation of section 246.3, subdivision (a); and in count IV, with assault with a firearm on Lopez's son, in violation of section 245, subdivision (a)(2). Counts I through IV were alleged to have occurred on July 7, 2014. Count V alleged Smith tried to intimidate a witness on July 18, 2014. Counts I, II, and IV also contained an allegation of personal use of a firearm as set forth in section 12022.5, subdivision (a). Count I also alleged a great bodily injury enhancement pursuant to section 12022.7, subdivision (a).

The jury found Smith guilty of counts I and III, but not guilty of counts II, IV, and V. The personal use of a firearm enhancement was found true as to the count I.

Smith was sentenced to an aggregate term of six years eight months. Smith filed a timely notice of appeal.

DISCUSSION

Smith contends the trial court was required sua sponte to instruct the jury with a unanimity instruction pertaining to the assault with a firearm charge pertaining to Lopez, and that the continuous course of conduct exception does not apply, because there were multiple acts that potentially could have constituted the basis of the conviction. We disagree.

Standard of Review

Claims of instructional error are reviewed de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 733; *People v. Hernandez* (2013) 217 Cal.App.4th 559, 568 (*Hernandez*).)

Unanimity Requirement

“In California, a jury verdict in a criminal case must be unanimous. [Citations.] Thus, our Constitution requires that each individual juror be convinced, beyond a reasonable doubt, that the defendant committed the *specific* offense he is charged with. [Citation.] Therefore, when the evidence suggests more than one discrete crime, either (1) the prosecution must elect among the crimes or (2) the trial court must instruct the jury that it must unanimously agree that the defendant committed the same criminal act. [Citations.] The unanimity instruction must be given sua sponte, even in the absence of a defense request to give the instruction.” (*Hernandez, supra*, 217 Cal.App.4th at p. 569.)

A defendant is entitled to a verdict in which all 12 jurors concur beyond a reasonable doubt as to each count charged. (*People v. Jones* (1990) 51 Cal.3d 294, 305.) “When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act.” (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534; *People v. Mota* (1981) 115 Cal.App.3d 227, 231 [“ ‘ “where there are multiple acts placed before a jury, each being a separate chargeable offense in itself, the prosecution must elect the act on which the charge will stand,” or otherwise “the jurors [might] range over the evidence at will and pick out any one of the offenses upon which to found its verdict.” ’ ”].) If a case requires use of the instruction, the court must give it sua sponte. (See *People v. Hefner* (1981) 127 Cal.App.3d 88, 97.)

The reason for this requirement is that absent an election or a unanimity instruction, when there is more than one unlawful act shown by the evidence, there is the risk that the jurors will select different acts in finding guilt, with none of the acts being chosen by the jurors unanimously. This would violate the constitutionally based requirement that the jury must unanimously agree on each charge. “ ‘The [unanimity]

instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.’ [Citation.] [¶] On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant’s precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the ‘theory’ whereby the defendant is guilty.” (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

Here, the prosecutor elected the specific act that was the basis of each charge and identified the basis for each charge in her opening statement. The jury was told that count I was based on Smith’s act of hitting Lopez in the face while personally armed with a firearm. Count II was based on Smith’s act of pointing the gun at Lopez and saying, “You’re dead.” Count III was based on Smith shooting and deflating the tire of Lopez’s car. Count IV was based on Smith’s pointing the gun at Lopez’s son, and count V was based on Smith’s comments to Lopez’s son several days after the shooting incident.

The jury was instructed that their verdict on each count had to be unanimous. The jury returned a guilty verdict for counts I and III, but not II. Therefore, it follows that the jurors all agreed that Smith committed the act specified by the prosecutor as constituting the count I offense.

Where, as here, the prosecutor has selected the specific act that is the basis of the charge, the trial court is not required sua sponte to instruct the jury with a unanimity instruction. (*People v. Russo, supra*, 25 Cal.4th at p. 1132.)

Continuous Conduct

Alternatively, although Smith argues the continuous conduct exception cannot apply in his case, insofar as the evidence can be interpreted as demonstrating multiple acts that could have formed the basis of the count I conviction, the brevity of the incident warrants application of the continuous conduct exception.

Case law holds that “a ‘ “unanimity instruction is not required when the acts alleged are so closely connected as to form part of one transaction.” ’ [Citation]. Specifically, ‘[t]he “continuous conduct” rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.’ ” (*People v. Williams* (2013) 56 Cal.4th 630, 682.) The continuous conduct exception is invoked when multiple criminal acts take place “ ‘within a very small window of time.’ ” (*Ibid.*) “The justification for the exception is that there is no need for an instruction when there is a single course of conduct because members of the jury cannot distinguish between the separate acts. Further, the instruction is unnecessary when the defendant proffers the same defense to multiple acts because a guilty verdict indicates that the jury rejected the defendant’s defense in toto.” (*Hernandez, supra*, 217 Cal.App.4th at p. 572.)

The defense argued at trial that the entire episode on July 7, 2014, lasted between 10 and 60 seconds. The evidence at trial supports the conclusion the July 7, 2014, incident was a rapid sequence of events. The assault on Lopez reasonably could be viewed as having commenced when Smith pointed the gun at Lopez while Lopez was sitting in the driver’s seat, continued while Smith struck Lopez in the mouth, and further continued while Smith moved to the front of Lopez’s car, all while pointing the gun at Lopez. No unanimity instruction is required to be given when the criminal acts are so closely connected as to form a single transaction or where the offense is itself a continuing course of conduct. (*People v. Sanchez* (2001) 94 Cal.App.4th 622, 631.)

DISPOSITION

The judgment is affirmed.